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that "There is, in truth, no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title because, under our law, he has no title whatever. . . . He may deal with the mortgagor, in respect to the mortgaged estate, upon the same footing as any other person; he may buy in encumbrances for less than their face, and hold them against the mortgagor for the full amount; he may do what any other person may do, and his acts are not subject to impeachment simply because he is mortgagee."

It may be admitted that both parties occupy a fiduciary relationship toward each other in the sense that each owes the duty of using reasonable means to protect the other's interest; yet to make the unqualified statement that one party is a trustee for the other seems to be grafting upon the law of trusts an extension that may prove dangerous. Is it not both safer and more accurate to say that, like principal and agent, the mortgagor and mortgagee are bound to act fairly in respect to each other and to the property in which they are mutually interested? If the terms trustee and *cestui que trust* must be used to denote the relationship, it should always be remembered that they are not being applied in their technical sense.

EMMETT C. WILLIS, JR.

Mortgages—Suretyship where Grantee of Mortgagor Assumes Mortgage Debt.

The maker of a bond secured by a mortgage sold the mortgaged premises, his grantee assuming payment of the bond. Thereafter the mortgagee dealt directly with the grantee, receiving partial payments on the bond, and agreeing to an extension of time thereon without the mortgagor's consent. In a suit on the bond by the mortgagee against the mortgagor, *held*, as between the mortgagee and the mortgagor the character of the latter was not changed from principal to surety by the fact that his grantee "assumed" the mortgage. The mortgagor was therefore not discharged by the extension of time granted without his consent by the mortgagee to the grantee.¹

Where the grantee "assumes" the mortgage debt it is generally held that he becomes personally liable therefor.² As a corollary to this

¹ *Commercial National Bank of Charlotte v. Carson*, 207 N. C. 495, 177 S. E. 335 (1934). This case proceeds upon the authority of *Brown v. Turner*, 202 N. C. 227, 162 S. E. 608 (1932), noted in (1932) 11 N. C. L. Rev. 96.

² *Keller v. Ashford*, 133 U. S. 610 10 Sup. Ct. 494, 33 L. ed. 667 (1889); 2 JONES, MORTGAGES (8th ed. 1928) §934. This liability may be based upon either of two theories: first, that the mortgagee is subrogated to the rights of the mortgagor; or second, that the mortgagee, as a third party beneficiary, may sue the grantee directly. N. C. now allows a suit under either theory. *Rector v. Lyda*,

proposition, the great majority of cases hold that while the mortgagor is not released, still if the mortgagee recognizes the liability of the grantee at all, then he must also recognize that the liability of the original mortgagor has become "secondary" and that a suretyship relation has arisen.³ In jurisdictions adopting this view, if the mortgagee and the grantee deal with the property so as to injure the mortgagor without his consent, he is released wholly⁴ or at least *pro tanto* to the extent of his injury.⁵ This result is based upon the familiar principle of suretyship that the creditor must do no act without the surety's consent which will impair the rights of the surety upon pain of releasing the latter.⁶ Thus, a binding extension of time granted by the mortgagee to the grantee operates to discharge the mortgagor⁷ unless the extension is assented to by the mortgagor,⁸ or unless the rights of the mortgagee against the mortgagor are expressly reserved.⁹ If the mortgage debt is evidenced by a negotiable instrument, then some jurisdictions which adopt the majority view as to the creation of a creditor-surety relationship hold

180 N. C. 577, 105 S. E. 170 (1920); *Parlier v. Miller*, 186 N. C. 501, 119 S. E. 898 (1923); *Keller v. Parrish*, 196 N. C. 733, 147 S. E. 9 (1929); *Coxe v. Dillard*, 197 N. C. 344, 148 S. E. 545 (1929); *Notes* (1922) 21 A. L. R. 439; (1927) 47 A. L. R. 339.

³ *Union Mut. L. Ins. Co. v. Hanford*, 143 U. S. 187 12 Sup. Ct. 437, 36 L. ed. 118 (1891); *Smith v. Davis*, 67 Colo. 128, 186 Pac. 519 (1920); *Blumenthal v. Serota*, 129 Me. 188, 151 Atl. 138 (1930); *Calvo v. Davies*, 73 N. Y. 211 (1878); see *White v. Augello*, 142 Misc. Rep. 233, 254 N. Y. S. 228 (1931).

⁴ *Blumenthal v. Serota*, 129 Me. 188, 151 Atl. 138 (1930); *United States Bldg. and L. Asso. v. Burns*, 90 Mont. 402, 4 P. (2d) 703 (1931); *Bank of Rochester v. Scanlon*, 146 Misc. Rep. 695, 262 N. Y. S. 790 (1933) (three day extension of time released mortgagor *in toto* from liability on a bond for \$170,000).

⁵ *Mutual Benefit Life Ins. Co. v. Lindley*, 183 N. E. 127 (Ind. App. 1932); *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269 (1895); *Zastrow v. Knight*, 56 S. D. 554, 229 N. W. 925 (1930).

⁶ *Miller v. Stewart*, 22 U. S. 680, 6 L. ed. 189 (1824). In *Rees v. Berrington*, 2 Ves. Jr. 540 (Ch. 1795) the principle is stated thus: "It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor." 1 BRANDT, SURETYSHIP (3rd ed. 1905) §376; 2 WILLISTON, CONTRACTS (1920) §1222.

⁷ *Fischer v. Boller*, 227 Mo. App. 52, 51 S. W. (2d) 141 (1932); *Bank of Rochester v. Scanlon*, 146 Misc. Rep. 695, 262 N. Y. S. 790 (1933); *Wright v. Bank of Chattanooga*, 166 Tenn. 4, 57 S. W. (2d) 800 (1933); *Gillman v. Purdy*, 167 Wash. 659, 9 P. (2d) 1092 (1932); see *Hamilton Co. v. Rosen*, 53 R. I. 346, 166 Atl. 691 (1933). To effect a discharge of the mortgagor, he must show that at the time of granting the extension the mortgagee had actual knowledge that the grantee had assumed the mortgage. *Mississippi Valley Trust Co. v. Bussey*, 49 F. (2d) 881 (C. C. A. 5th, 1931); *Chilton v. Brooks*, 72 Md. 554, 20 Atl. 125 (1890); *Erickson v. Todd*, 252 N. W. 879 (S. D. 1934).

⁸ Burden of showing assent by the mortgagor rests on the mortgagee. *Burgess v. Ohio Nat. Life Ins. Co.*, 48 Ga. App. 260, 172 S. E. 676 (1934).

⁹ A reservation of rights against the surety is effectual to prevent his discharge because it is construed as preserving to him all his rights against the principal obligor unimpaired. *Hodges v. Elyton Land Co.*, 109 Ala. 617, 20 So. 23 (1895); *Meredith v. Dibrell*, 127 Tenn. 387, 155 S. W. 163 (1913).

that the provisions of the N. I. L. apply so as to prevent the mortgagor maker of the instrument from being discharged.¹⁰

However, a few courts follow the view of the principal case and hold that as between the mortgagee and the mortgagor no creditor-surety relationship arises.¹¹ The logical result of this holding is that no subsequent dealings between the mortgagee and the grantee, such as an extension of time on the debt, can have the effect of discharging the mortgagor.¹²

In the principal case the court intimated that its judgment did not preclude the mortgagor, who had been compelled to pay, from recovering over against the grantee. If this means that the mortgagor may hold the grantee immediately and before the extension of time has expired,¹³ then obviously the grantee has been cut out of the benefit of the extension agreement for which he has given valuable consideration.¹⁴ On the other hand, if the mortgagor may not recover over against the grantee until after the extension of time has expired, then he is being held to an extension agreement to which he never assented and to which he was not even a party;¹⁵ meanwhile the grantee may have gone bank-

¹⁰ *Peter v. Finzer*, 116 Neb. 380, 217 N. W. 612 (1928) (maker of note who was by its terms unconditionally bound to pay was primarily liable under section 192 of N. I. L. Section 119, which provides for discharge of a negotiable instrument, and so for discharge of one primarily liable thereon, does not provide for any discharge by an extension of time); *Washer v. Tontar*, 128 Ohio St. 111, 190 N. E. 231 (1934); *Sloan v. Gates*, 166 Tenn. 446, 62 S. W. (2d) 52 (1933); *Atlantic Life Ins. Co. v. Carter*, 165 Tenn. 628, 57 S. W. (2d) 449 (1933); *Continental Mut. Sav. Bank v. Elliott*, 166 Wash. 283, 6 P. (2d) 638 (1932); *cf. Finzer v. Peter*, 120 Neb. 389, 232 N. W. 762 (1930); *Wright v. Bank of Chattanooga*, 166 Tenn. 4, 57 S. W. (2d) 800 (1933). *Contra: Stapler v. Anderson*, 177 Ga. 434, 170 S. E. 498 (1933); *Burgess v. Ohio Nat. Life Ins. Co.*, 48 Ga. App. 260, 172 S. E. 676 (1934); *Prudential Ins. Co. of America v. Bass*, 257 Ill. 72, 191 N. E. 284 (1934); *Mutual Benefit Life Ins. Co. v. Lindley*, 183 N. E. 127 (Ind. App. 1932); *Jefferson County Bank v. Erickson*, 188 Minn. 354, 247 N. W. 245 (1933); *Zastrow v. Knight*, 56 S. D. 554, 229 N. W. 925 (1930). Blocki, *Is Mortgagor's Liability Extinguished by Extension of Time of Payment Without His Consent?* (1932) 11 CHICAGO-KENT REV. 1; Note (1933) 19 VA. L. REV. 618.

¹¹ *Pfeifer v. W. B. Worthen Co.*, 74 S. W. (2d) 220 (Ark. 1934); *Boardman v. Larrabee*, 51 Conn. 39 (1883); *Iowa Title and Loan Co. v. Clark Bros.*, 209 Iowa 169, 224 N. W. 774 (1929); *Bradstreet v. Gill*, 22 N. M. 202, 160 Pac. 354 (1916).

¹² *Wolfe v. Murphy*, 47 App. D. C. 296 (1918); *Denison University v. Manning*, 65 Ohio St. 138, 61 N. E. 706 (1901); *Brecht v. Bialas*, 19 Pa. Dist. R. 664 (1910).

¹³ That the mortgagor may sue immediately, see: *Iowa Title and Loan Co. v. Clark Bros.*, 209 Iowa 169, 224 N. W. 774 (1929); *Denison University v. Manning*, 65 Ohio St. 138, 61 N. E. 706 (1901).

¹⁴ If there had been no consideration for the extension agreement, then the mortgagor would not be released at all, since in no jurisdiction does mere indulgence given by the mortgagee to the purchaser have this effect. *Boardman v. Larrabee*, 51 Conn. 39 (1883); *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5 (1899); *Erickson v. Todd*, 252 N. W. 879 (S. D. 1934); *Gillman v. Purdy*, 167 Wash. 659, 9 P. (2d) 1092 (1932).

¹⁵ No case has been found in which the mortgagor was held liable and at the same time was denied immediate rights over against his grantee. It is to be noted,

rupt, rendering the delayed remedy ineffectual. Thus, whatever happens, one or the other party must lose a valuable right. This dilemma seems unavoidable under the holding of the principal case that no surety relationship arises. In view of this difficulty, and since there is North Carolina authority flatly *contra* to the principal case,¹⁶ it is suggested that North Carolina should reverse its present position on this point so as to follow the majority view and its own previous holding.¹⁷

F. M. PARKER.

Negligence—Infant Trespassers—the Attractive Nuisance Doctrine.

The plaintiff's eight year old girl wandered onto a cement walk across defendant's bridge and, while dropping rocks from a pile of crushed stone on the bridge into the water below, fell off and was drowned. Several small children lived in a mill settlement nearby. A nonsuit was affirmed on the grounds that infants are as essentially trespassers as adults and may not recover under the attractive nuisance doctrine unless the facts are sufficient to impose the duty of anticipation or prevision.¹

But in another case decided the same day the court held that the defendant should reasonably have anticipated that small children would be attracted to and injured by his property where the plaintiff's two infant children were drowned in an unguarded, abandoned cistern or reservoir around and in which children had been accustomed to play and fish for a number of years.²

The doctrine of attractive nuisance is an exception to the general rule that a landowner is not responsible to a trespasser for a condition

however, that the majority view, according to which the mortgagor is released from liability to the mortgagee, goes upon the assumption that by granting the extension of time the mortgagee has put it out of the power of the mortgagor to have the same remedy over he would have had but for such extension. See *Mississippi Valley Trust Co. v. Bussey*, 49 F. (2d) 881 (C. C. A. 5th, 1931).

¹⁶ *Hamilton v. Benton*, 180 N. C. 79, 104 S. E. 78 (1920) (while a chattel mortgage was involved here, no reason is seen why this should justify a distinction between this and the principal case. However, the result of this case was also placed upon another ground.)

¹⁷ This might be effected by a statute somewhat as follows: Whenever any real or personal property incumbered by a mortgage shall be conveyed subject to such mortgage, and in such conveyance there shall be a provision that the grantee shall assume and pay such incumbrance, if the holder of the mortgage thereafter recognizes the liability of the grantee to him, by accepting payments on the mortgage debt or otherwise, then, as against such holder of the mortgage, the grantee shall be considered the principal debtor and the mortgagor or intermediate grantee who may likewise have assumed the mortgage shall be considered a surety.

¹ *Boyd v. Atlanta S. C. A. L. R. Co.*, 207 N. C. 390, 177 S. E. 1 (1934).

² *Brannon v. Sprinkle*, 207 N. C. 398, 177 S. E. 114 (1934).